after proof *aliunde* of the facts charged, either to show that the sums received as alleged in the Charge were received with a corrupt motive, or to rebut the defence that the sums were received for an innocent purpose. As, however, there was no evidence *aliunde* that the sums charged were ever received the evidence about other sums received on other occasions should have been ignored. I do not think it is necessary for me to refer in any detail to all the authorities on the subject. I will confine myself to saying that in expressing the views given above I have been guided by the decisions of the House of Lords and the Privy Council in the cases of *Makin v. Attorney-General for New South Wales*[2], *Harris v. Director of Public Prosecutions*[1] and *Noor Mohamed v. Rex*[3] the decision of the Court of Criminal Appeal in *Rex v. Straffen*[4] and the decision of the Court of Appeal in *X. v. Public Prosecutor*[5].

In my opinion there was no evidence before the Sessions Court that the first two appellants committed the offences charged, and I therefore quashed both their convictions.

The 3rd appellant having been charged with abetment of offences by the first two appellants which they never committed, it was clear that in the circumstances of this case his convictions could not stand. As, for the reasons given hereafter, I could not alter the charge, the only question I had to decide, therefore, with regard to this appellant was whether or not there should be a retrial.

This brings me to a very unfortunate aspect of this case. A considerable body of evidence was given at the hearing which went to suggest that the Senior Conductor and the Junior Conductor were the persons mainly responsible for this unauthorised collection of $6 per ration card from the labourers and that the 3rd appellant, who was a clerk on the Estate, was to some extent acting on their instructions. In his Grounds of Decision the learned President says: "I agree with both learned Defence Counsel that on the evidence before the Court many of the senior estate conductors should also have been on trial". I find it a little difficult to believe that no hint of this appeared anywhere in the statements taken from the witnesses in the Police investigation and in my opinion the question of why these Conductors were not prosecuted along with the other appellants is one which the appropriate authorities would do well to investigate. The Junior Conductor was called as a witness by the prosecution but the Senior Conductor was not only not called but was allowed to proceed to India before the trial for the purpose of getting married. The Investigating Officer, who was the 1st Prosecution Witness and who apparently also conducted the prosecution, was by leave of the Court recalled towards the end of the prosecution case and admitted that before the case came on for trial he had told Counsel that he was not going to subpoena the Senior Conductor Madhu Pillay. The learned President appears to have taken a sufficiently serious view of this aspect of the matter to ask at the close of the case for the prosecution that another Prosecutor Officer be provided.

Whether or not it be a fact that the 3rd appellant was to some extent acting under orders when he received this money there is evidence on the record which might lead to the conclusion that he committed some offence. The learned President in his Grounds of Judgment discussed the question of whether a more appropriate charge against this appellant would not have been cheating but he referred to this as a purely technical point. He did not, as I think he might have done, alter the charge either to one of accepting bribes or to one of cheating and give the appellant the opportunity of recalling any witnesses. For this reason it was clearly impossible for me to alter the charge and record a conviction upon such altered charge. I considered therefore whether my best course would be simply to quash the conviction on the charge of corruption and leave the prosecution to take such steps as they might be advised with regard to fresh proceedings against the 3rd appellant for cheating or such other offence as they thought proper. The learned Deputy Public Prosecutor, however, urged upon me that there might be difficulties in the way of the prosecution if I did this, and that a plea of *autrefois acquit* might be raised. For this reason, upon an undertaking given by the learned Deputy Public Prosecutor that all those found to be concerned would, in fact, be prosecuted along with this appellant I set aside the conviction and sentence and ordered a retrial. Under this form of order it will be open to the prosecution not to proceed further against this appellant, if after further investigation they come to the conclusion that justice would be served by prosecuting others without joining him. This is a matter entirely in the discretion of the Public Prosecutor.

Convictions of 1st & 2nd appellants quashed. Retrial of 3rd appellant ordered.

DAIMON BIN BANDA v. PUBLIC PROSECUTOR.

[C. A. (Foster Sutton, C.J., Thomson and Wilson, JJ.) Kuala Lumpur, May 15, 1951]

Prevention of Corruption Ordinance, 1950, s. 13(1) and (3) — Evidence Ordinance, s. 114 — Effect of s. 13(1) of the Prevention of Corruption Ordinance, 1950

on the rule as to accomplices — When witness unworthy of credit — Penal Code, s. 165.

This matter came before the Court of Appeal as the result of a certificate given by the Public Prosecutor under the provisions of section 34 of the Courts Ordinance, 1948. The point referred for determination was "whether a witness in a trial for an offence referred to in section 13(1) of the Prevention of Corruption Ordinance, 1950, shall be presumed to be unworthy of credit if a payment of money being the subject of the charge, was made by him and at his own suggestion".

Held: the effect of the provision is that, in corruption cases, a person is no longer to be presumed unworthy of credit merely by reason of the fact that he has made or caused to have made an improper payment.

COURT OF APPEAL, appeal from the decision of Taylor, J. reported in (1951) M.L.J. 11.

A. J. Bostock Hill for the appellant.

A. M. I. Austin (D.P.P.) for the respondent.

Cur. Adv. Vult.

Foster Sutton, C.J. : — This matter came before us as a result of a certificate given by the Public Prosecutor, under the provisions of section 34 of the Courts Ordinance, 1948, by which he certified that the determination of this appeal involved a point which it is desirable in the public interest to have determined by the Court of Appeal.

The point referred for determination is :—

"Whether a witness in a trial for an offence referred to in section 13(1) of the Prevention of Corruption Ordinance, 1950, shall be presumed to be unworthy of credit if a payment of money, being the subject of the charge, was made by him and at his own suggestion."

Before the enactment of the Prevention of Corruption Ordinance, 1950, the position in this country, regarding the evidence of an accomplice was governed by section 114 of the Evidence Enactment of the Federated Malay States and equivalent legislation in the other States and in the Settlements (all of which have since been repealed and replaced by the Evidence Ordinance, 1950) under which the Court could presume "that an accomplice is unworthy of credit unless he is corroborated in material particulars" in every class of case where such evidence was under consideration, and by section 133 of the same Enactment which provides that: —

"An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."

The Evidence Ordinance, 1950, has not altered the law.

The law here is the same as in the United Kingdom. The uncorroborated evidence of an accomplice is admissible in law, but it is the practice for the Judge to direct himself, or the jury, as the case may be, of the danger of convicting an accused person on the uncorroborated testimony of an accomplice or accomplices. As has often been said, this rule of practice has become virtually equivalent to a rule of law. If, however, after such a direction the Judge or jury convict, the Court of Appeal will not quash the conviction merely upon the ground that the accomplice's testimony was uncorroborated.

That then was the position before the Prevention of Corruption Ordinance, 1950, became law. Subsection (3) of section 13 of that Ordinance reads as follows :—

"Notwithstanding any rule of law or written law to the contrary, no witness shall, in any such trial or inquiry as is referred to in sub-section (1) of this section, be presumed to be unworthy of credit by reason only of any payment or delivery by him or on his behalf of any money, gift or other consideration to an agent."

Before its enactment, the principle laid down by "Illustration (b)" of section 114 of the Evidence Enactment would have applied to any person abetting the commission of an offence against the provisions of section 165 of the Penal Code.

It was contended on behalf of the Public Prosecutor that sub-section (3) of section 13 of the Prevention of Corruption Ordinance abrogates the rule relating to accomplices in so far as the offences referred to in sub-section (1) of the section are concerned, and that being so, even, if the person who pays the bribe is the person who corrupts the public officer into receiving it, he is not now required to be regarded as a person whose evidence is unworthy of credit unless it is corroborated in a material particular. It was also urged, on behalf of the Public Prosecutor, that the word, "only" in sub-section (3) of the section qualified the word "reason" which immediately precedes it and not the subsequent words "payment or delivery".

In our view, the legislation in question does not go as far as contended by the Public Prosecutor. Before its enactment the mere fact that a person had made an improper payment to a public officer would have necessitated his being regarded as an accomplice to the offence in criminal proceedings against such officer under section 165 of the Penal Code, even although he had taken no part in corrupting the officer into receiving the bribe.

We agree with Taylor, J., that the effect of the new provision is that, in corruption cases, a person is no longer to be presumed unworthy of credit merely by reason of the fact that he has made, or caused to have made, an improper payment.

If, however, he has taken some more infamous part in the transaction, for example actively corrupted the public officer into accepting the bribe, the new provision does not cover his testimony. To go as

far as contended for on behalf of the Public Prosecutor would, in our opinion, be going beyond the fair sense of the language employed by the Legislature. If the person who pays the bribe is also the person who corrupts the public officer into receiving it, then the tests to be applied to his evidence are the same now as before. Not by reason of the fact that he paid the money, but because he played a part in the transaction not covered by the exception provided in sub-section (3) of the Prevention of Corruption Ordinance.

When a matter is brought before this Court under section 34 of the Courts Ordinance, it is required to be treated as a re-hearing of the appeal. At the hearing before us, however, the Deputy Public Prosecutor intimated that in all the circumstances he would not argue in support of the conviction.

That being so, and in view of the fact that inadmissible evidence was admitted at the trial, we do not propose to discuss the merits of this case, and we make no order on the Reference. The order made by Taylor, J., will, therefore, stand.

No order.

CHUA SEK LENG v. R.

[A. Cr. J. (Spenser Wilkinson, J.) November 26, 1952]

[Penang — Criminal Appeal No. 39 of 1952]

Criminal Procedure Code (Cap. 21), ss. 249, 265 and 448 — Questions put by Magistrate to accused — Failure to record questions — Irregularity.

This was an appeal from the conviction of the appellant on a charge under the Customs Enactment. The grounds of appeal were: (1) the learned Magistrate was wrong in questioning the appellant who elected to give a statement from the dock; (2) the learned Magistrate based his finding of guilty partly on answers to such questions.

Held: (1) the learned Magistrate was wrong in that he did not comply with section 265 of the Criminal Procedure Code which requires a Magistrate to record the questions asked as well as the replies thereto; (2) in this case the failure to write down the questions and answers in no way prejudiced the appellant and was therefore a mere irregularity curable under section 448 of the Code.

[**Editorial Note:** Special attention of the Magistrates is drawn to that part of this judgment where His Lordship advises them to make a note to section 249 in their copies of the Criminal Procedure Code, drawing special attention to provisions of section 265.]

CRIMINAL APPEAL.

G. H. Conaghan for the appellant.

C. M. Sheridan (D.P.P.) for the respondent.

Spenser Wilkinson, J. : — The appellant was convicted by the Magistrates' Court, Butterworth of an offence under section 114 (i) (f) of the Customs Enactment and was fined $1,500 or six months' rigorous imprisonment in default.

The first ground of appeal was that the learned Magistrate was wrong in questioning the appellant who elected to give a statement from the dock and the second ground was that the learned Magistrate based his finding of guilty partly on answers to such questions.

Dealing with the second ground first I do not think the Magistrate in fact based his judgment on the answers given by the accused to his questions. I think it is clear reading the grounds of judgment as a whole and the statement given by the accused to the Customs Officer that it was the admissions in the statement to the Customs Officer upon which the learned Magistrate based his decision.

The first ground of appeal raises a point of more importance. The appellant when called on for his defence elected to make a statement. The record then states :—

"Chua Sek Leng, affirmed, states in Teochew"

but I am informed that this is a clerical error and that the appellant was not in fact affirmed. At the conclusion of the appellant's statement from the dock the learned Magistrate asked him certain questions. He did not, however, record the questions but only the replies thereto. I assume that in putting the questions as he did the learned Magistrate was purporting to act under section 249 of the Criminal Procedure Code, but in so doing he appears to have overlooked the provisions of section 265. I do not really think that the Magistrate can be blamed for this, because there is no reference in section 249 to section 265 and, unless his attention was specifically drawn to the later section it would be very easy to overlook it. In section 256 of the F.M.S. Criminal Procedure Code which is the equivalent of our section 249 there are two additional sub-sections which reproduce in effect our section 265. Under that Code, therefore, when a Magistrate is making use of section 256 he has the whole law on the subject before him, whereas under the Straits Code when the Magistrate looks at section 249 there is nothing there to indicate that he must write down the whole of the questions put, together with the answers thereto and that he must read the questions and answers back to the accused and then sign the result. Section 265, however, makes this obligatory, and Magistrates would be well advised to make a note to section 249 in their copies of the Criminal Procedure Code, drawing special attention to the provisions of section 265.